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IN THE

Supreme Court of the United States

NO. 208

ASSOCIATED STORES, INC.,
Petitioner

v.

INDUSTRIAL LOAN AND INVESTMENT COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI

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OPINIONS OF THE COURTS BELOW

The Report of the Special Master containing his Findings of Fact is dated October ——, 1960 and is hereto appended. The Opinion of J. B. Craven, Jr., District Judge appears in 202 F. Supp. 251, copy of which is hereto appended. The Per Curiam opinion of the United States Court of Appeals for the Fourth Circuit is dated and filed January 24, 1964, is not yet published, but copy thereof is hereto appended.

JURISDICTIONAL GROUNDS

Jurisdiction is invoked upon the grounds that, as will be shown below, the Court of Appeals in affirming the judgment below, *per curiam*, decided the matter in conflict with decisions of other Courts of Appeal and has let stand a decision on an important question of state law in conflict with applicable and controlling state decisions. Further, the Court of appeals by its summary handling of the appeals of both parties so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. The provision of Rule 19

of the Rules of the Supreme Court and those of 28 USCA 2100 *et. seq.* support the petition and the latter reference is believed to confer jurisdiction to review the judgment in question by certiorari. By order of the Chief Justice dated April 21, 1964, time within which to petition for certiorari was extended to and including June 22, 1964.

QUESTION PRESENTED

1. Did the District Court err in failing to hold that any liability or obligation of petitioner to respondent was paid, satisfied or discharged in full with respect to any balance outstanding on any conditional sales contracts, the collection upon which was awarded to respondent by order of Gilliam, D. J., dated February 4, 1958?

2. Did the District Court err in determining that petitioner had sought equitable relief in such fashion as to mitigate the effect of the North Carolina usury law (G. S. 24-2) as applied to a portion of the unlawful interest exacted of petitioner by respondent?

STATEMENT OF CASE

This litigation was begun in the Superior Court of Wake County, North Carolina, in December 1957. In due time, by reason of diversity, it was removed to the United States District Court for the Eastern District of North Carolina, Raleigh Division. A Special Master was appointed to hear the evidence which consisted of some 2250 pages of testimony and 150 exhibits. While exceptions were filed to the Masters Report by both sides, *no* objections were filed to his Findings of Fact. Hearings were held before the District Judge who after an abortive appeal to the Court of Appeals determined the insufficiency of an earlier judgment, issued a Final Judgment in July 1963 based upon his opinion, copy of which is hereto appended, which appears in 202 F. Supp. 251. From this judgment, which with the opinion adopts the Findings of Fact of the Master, appeal was taken by *both* parties to the

Court of Appeals. Briefs were filed and argument was heard on January 21, 1964.

It is appropriate here to note that these appeals by both sides were set before a panel consisting of Haynsworth and Boreman, Circuit Judges, and Michie, District Judge. When the case was called, counsel were advised of Judge Haynsworth's illness and inability to sit. Counsel were assured by Judge Boreman that Judge Haynsworth would "read the briefs" and since the court followed the practice of tape recording the arguments he would be able to listen to the tape when he returned to duty. Counsel had little choice but to agree to proceed with arguments before the balance of the panel. On January 24, 1964, less than 3 full days after conclusion of the arguments, counsel received telegrams announcing the *per curiam* decision by the *entire* panel

It is this cavalier treatment of *two* appeals in a lengthy and complex matter which gives rise to the suggestion now that the Court of Appeals has so far departed from established judicial procedures as to warrant supervision by this Court.

This is an action to recover the penalty provided by the North Carolina Usury Statute (G. S. 24-2) by reason of usurious exactments by respondent, Industrial, of petitioner, Associated, under the terms of and pursuant to certain contracts and business arrangements begun in January, 1955, and terminated in December, 1957.

The question of whether violation of the Usury Statute occurred and unlawful interest was exacted by the respondent *does not* arise in the consideration of this petition, for that such has been determined *in favor of petitioner* by the judgment and opinion of the District Court, affirmed by the Court of Appeals, and time within which request for rehearing or petition to this Court is not now available to respondent. The question, so far as this case is concerned is decided with finality.

The Questions Presented, as stated above, on this Petition are related to the following pertinent facts set out in the Record and in the Master's Findings of Fact as they appear in the Appendix to this Petition, namely:

I

As Finding #53 of the Master's report will indicate, the hearing before Judge Gilliam prior to the issuance of the order of February 4, 1958, was held upon motions of the respondent, Industrial, and upon Industrial's request that the collection of the accounts of petitioner's customers be turned over to the respondent. The recommended award of the Master and that of the District Judge is based upon the difference between money realized by the respondent and the total amount of funds advanced to Associated with respect to these conditional sales contracts, precisely that which Associated was guaranteeing at the time of assignment of each and every contract. Judge Gilliam found Industrial "is entitled to collect and have paid direct to it all future payments on contracts which it purchased." He further found in his Finding #11 " . . . the value of said conditional sales contracts is directly affected by collection efforts and equipment servicing facilities and personnel." As to what was done by Industrial to bring about payment of the accounts turned over to it by Judge Gilliam's order, the Master found that "collections deteriorated", a finding which takes on added significance when one considers that there is no finding to indicate that collections prior to that time had been anything but substantially satisfactory. From February 4, 1958, forward the guarantor of the accounts, Associated, had no opportunity or right to protect itself as a result of the lender's (Industrial's) insistence.

II

As to the second of the questions presented, the Court will be interested in observing the exact language of plaintiff's

(Associated's) pleading which gives rise to this question. In paragraph 9 of the Complaint, after recitation that plaintiff's business depends on continuing good relations with its customers and constant contact in order to insure the integrity of the security, it is alleged:

> ". . . that for reasons bearing no relation to the rights and obligations of the parties hereto, defendant has embarked upon and now threatens to pursue the practice of confounding and confusing plaintiff's customers, few of whom have any concept or understanding of the obligations under such conditional sales contracts except the obligation to pay monthly installments; that customers pay many times at the stores; that up until the present time the only contact customers had were with representatives of the plaintiff; that defendant is now diverting from the plaintiff and receiving for its own use monthly payments from plaintiff's customers; that the action of the defendant will impair the integrity of the security, and if permitted to continue will seriously and substantially affect and damage to the point of destruction the means by which plaintiff may continue to pay its obligations."

> "10. That even though an unpaid balance of said loan or loans made by defendant to plaintiff either now due or to become due are substantially or wholly reduced and off-set by the amount now recoverable by plaintiff of the defendant under the terms of G. S. 24-2, plaintiff is entitled in equity to have its interest in said customer conditional sales contracts protected by a continuation of the practice under which the payments of said contracts have been assured as regular, prompt and certain to a substantial degree . . ."

Thereupon, the plaintiff, in its prayer for relief asked for and obtained a restraining order to stop the practice of interfering with the plaintiff's collection of the conditional sales

contracts and any other practice which might impair the security for the debt plaintiff owed defendant. (See Finding of Fact #52)

ARGUMENT

In amplification of the reasons relied on for the allowance of a Writ of Certiorari on the Questions Presented, we respectfully submit:

First

1. Did the District Court err in failing to hold that any liability or obligation of petitioner to respondent was paid, satisfied or discharged in full with respect to any balance outstanding on any conditional sales contracts, the collection upon which was awarded to respondent by order of Gilliam, D. J., dated February 4, 1958?

Our position on this point is based upon the proposition that a guarantor, such as Associated, must have the right to proceed with all vigor to collect from his customers. Otherwise, the lender can take the security, as did Industrial, sit back without spending money or effort on collection and look to the guarantor whose hands were tied from protecting himself at the lender's (Industrial's) insistence. All of this could have been done in protection of everyone's rights by proper order had not Industrial insisted on having its cake and eating it too. Industrial clearly had no intention of engaging in a vigorous, or even normal, collection program and these contracts obviously could not and would not yield anything like their face value.

Precisely, in line with this position taken by petitioner is the case of *Rand v. Gillette* (1930), 199 N.C. 462, 154 S.E. 746, where there was a civil action to restrain the defendant from foreclosing certain mortgages or deeds of trust on the ground that the debts secured thereby have been fully paid and satisfied. It appeared that in a similar prior action brought by a judgment creditors of the plaintiff there was

their allegation that the instruments were not bona fide encumbrances but that they had been paid. The plaintiff in the subsequent action was a party in that proceeding and filed an affidavit denying the allegations of the complaint. The court then permitted the present defendant to foreclose the mortgages according to law.

The plaintiff now brings his action and makes the same contention that was made by his judgment creditor in the former suit.

The court held as follows:

"The judgment must be affirmed on authority of what was said in *Distributing Company v. Carraway*, 196 N.C. 58, 144 S.E. 535. A party is not permitted to take a position in a subsequent judicial proceeding, which conflicts with a position taken by him in a former judicial proceeding, when the latter position disadvantages his adversary. *Hardison v. Everette*, 192 N.C. 371, 135 S.E. 288.

"The plaintiff is face to face with the lesson, taught every day in the school of experience, that he cannot safely 'run with the hare and hunt with the hound'. He induced the court to adjudge the instruments in suit as valid and subsisting liens in 1929. If this were erroneous, as he now alleges, he has no one to blame but himself.

"The plaintiff may have his remedy at law, but equity having heard him once will not listen to him now in reversal of his former position on the same subject. The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of man. It requires that one should do unto others as in equity and good conscience he would have them do unto him, if their positions were reversed. *Bodie v. Bond*, 154 N.C. 359, 70 S.E. 824. Its compulsion is one of fair play. *Sugg v. Credit Corporation*, 196 N.C. 97, 144 S.E. 554."

Estoppel rests largely upon injury or prejudice to the rights of him who asserts it. See note in 19 Am. Jur. 728 et seq. for a full treatment on the subject.

The position taken by the one against whom the estoppel is asserted need not be acted upon by the other party but by the *court*, if his adversary is prejudiced. *Bizzel v. Auto Tire Equipment Company*, 182 N.C. 98, 103, 108 S.E. 439.

The law in North Carolina to this effect seems well settled as is illustrated in the holdings of the court in the following significant cases: *Kanupp v. Land*, 248 N.C. 203, 206; *Owens v. Voncannon*, 252 N.C. 461; *Roberts v. Grogan*, 222 N.C. 30, 21 S.E. 2d 30; *Long v. Traniham*, 226 N.C. 510, 39 S.E. 2d 384; *Hylton v. Mount Airy*, 227 N.C. 622, 44 S.E. 2d 51; and *Ingram v. Power Company*, 181 N.C. 359, 107 S.E. 209.

To the same effect is *Chandler v. McKerral*, 68 F. 2d 343, 346.

Attention also is invited to *Commercial Credit Company v. Eisenhour*, 28 Ariz. 112, 236 P. 126, 41 A.L.R. 1274, and a full discussion of the subject may also be found in 31 C.J.S. 372 et seq.

Of course, it should also be pointed out that upon the entry of the order of February 4, 1958, Associated manifestly could not appeal or do anything but sit back and take it. Industrial, relying on the guarantee extracted from plaintiff, did nothing but sit back and watch the petitioner squirm.

Judge Gilliam's order of February 4, 1958, left Associated in the position of being a guarantor who had neither access to the security for his obligation nor opportunity to protect himself and provide for means of satisfying the guarantee. This whole business arrangement depended upon constant customer attention. There is no situation in the laws of Banking, or of Bills and Notes or of Credit that we are aware of where one who endorses an obligation with re-

course or otherwise guarantees its payment is not permitted to use all reasonable means at law to save himself harmless. To hold now that Associated must pay Industrial and sweep up the dregs of conditional sales contracts which have been permitted to go sour over the years is plainly offensive to all rules of business relationship and simple justice.

Industrial's lone representative in North Carolina, Mr. Zimmerman, summed up Industrial's attitude towards the matter of collecting on this security by testifying "We do not have the knowledge, manpower or money" to work these accounts.

In conclusion, if Industrial's collection efforts had really been vigorous and effective, there would have been *no* basis for an outstanding balance with respect to which the Master found that Industrial was entitled to recover from Associated. As it was, the Court can see from the "Final Judgment" of August 20, 1963 that of accounts turned over to it by Judge Gilliam's order of February 4, 1958 totalling in excess of $350,000.00, Industrial had collected *only* the sum of $162,330.38. (Finding of Fact No. 2(d)). Associated may have been slow in making remittances to Industrial, but certainly its record of collection, as shown by the Master's findings, was good enough to exceed those of Industrial by the proverbial "country mile." (See Finding of Fact #76)

Second

2. Did the District Court err in determining that petitioner had sought equitable relief in such fashion as to mitigate the effect of the North Carolina usury law (G. S. 24-2) as applied to a portion of the unlawful interest exacted of petitioner by respondent?

Industrial contends that by asking equitable relief as set out in its complaint and prayer for referred to above, Associated had been precluded from its right under the Usury Statute (G. S. 24-2) to recover the penalty for usury

exacted and that Industrial was entitled to be paid simple interest on certain outstanding balances advanced to Associated.

Associated contends that its complaint can be interpretated as stating two causes of action, one at law and one in equity. At law, Associated asks for penalty under G. S. 24-2 for all usurious interest paid, reserved or received by Industrial. In equity, Associated asks that Industrial be restrained from interfering with its collections. It is elementary that causes arising between parties, both at law and in equity, or mixed, may be joined in a single action. G. S. 1-123. Thus, Associated has alleged separate and distinct causes of action which do not depend, one upon the other, for their vitality.

Associated *seeks no equitable relief with respect to the indebtedness upon which usury was charged.* As the long line of cases in North Carolina will disclose, this is an ever present ingredient where the equitable maxim is employed.

Even if the court should determine that there was equitable relief prayed for in one of the series of transactions, certainly the loans under the 1955 contract were paid. No equitable relief could possibly attach to this series of closed transactions, and the Special Master and the District Court below so held. The same argument is urged on the court as to all fully paid loans under the second contract. Would the court require plaintiff to bring a bill in equity to restrain defendant from interfering with its collections and a separate suit at law under G.S. 24-2 in the face of G.S. 1-123? The court will observe in the cases cited below that the law taken most favorably for the defendant has *never* imposed the equitable maxim except where loans were outstanding. The main relief prayed for in those actions was equitable remedy to prevent foreclosure of property, not for usurious penalty. Our case is obviously different as we shall point out later.

Associated further contends that the court should con-

sider that the equitable relief prayed for by Associated was eliminated from this action on motion of Industrial and prior to any consideration of the merits of this action. Associated contends that the District Court considered the equitable relief prayed for as a separate and distinct matter and one which it could eliminate as a matter of law under the terms of the contract between the parties. The court did not say: "You must tender principal and legal interest before it could consider equitable relief." No, the court considered the answer, cross-claim and motion of defendant asking that injunction granted to plaintiff be dissolved as, under covering contract, Industrial was entitled to collect money direct from customers. There is no allegation in defendant's pleadings with regard to equitable maxims. Industrial's pleadings ask primarily for a money judgment against Associated upon a cross-claim and for an accounting to determine such amounts as may be due. This is where the equity jurisdiction may have been invoked after dissolution of restraining order on motion of Industrial and without appeal by Associated. Or possibly it was invoked when Industrial sought equitable relief by motion to restrain Associated from collecting accounts and turning same over to defendant. The order on defendant's motion for equitable relief was granted and is in force even now.

On this point, the only issue raised by the petitioner which is before the Court, is its claim in law under G.S. 24-2 for penalties for usurious interest charged, received or reserved by Industrial and the issue raised by its reply to counterclaim for off-sets.

The plaintiff now seeks no equitable relief. The equitable maxim "he who seeks equity must do equity" does not apply to Associated's action in its present posture, nor in the form presented to the Special Master.

We also would ask the court not to lose sight of the fact that the equity which Associated sought was to have Industrial

stop interfering with its *collections, not* to affect in any manner the payment of Associated's obligation to Industrial. Industrial, without demand or notice to Associated, wrote a letter to all of Associated's customers advising them to pay direct to Industrial and that Associated *no longer had any interest in the accounts.* Certainly Industrial should not be allowed to take advantage of the position into which they forced Associated. Defendant's own exhibits clearly reflected the loss Associated has suffered by virtue of Industrial taking over the collection of the loans on its own motion. (See Finding of Fact No. 54.) For instance, the Record will show Industrial repossessed machines whose balance on contracts from Associated to Industrial (not full customer balance) was $77,000 and credited Associated with $20,000, thus claiming Associated should pay them $57,000; that Industrial settled with customers $24,000 in accounts for $10,000 thus alleging on accounts they took over that Associated owes them $14,000; and that they sold repossessions that represented $32,000 in loans from Associated to Industrial for $8,600 and thus Associated owes them $24,000. Or, on paper that Industrial petitioned court for permission to collect, over the prayer of Associated, Industrial now seeks recovery of some $95,000.00. This is an enormous amount, which clearly reflects that the proper collecting agent, should equity have hindsight, would have been Associated. However, equity took the parties as they were, and decided the issue against Associated and for Industrial and there was no appeal from this decision of the District Court. Industrial wrote to the customers; Associated asked that it be enjoined; Industrial countered that it be allowed to take over; the court agreed with Industrial and disallowed Associated's request. Should Industrial be allowed now to take advantage of this situation on Associated's claim for usury?

Assuming that plaintiff should fall within the maxim — that the separable causes of action should be considered